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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MICHELLE RENEE BESS,<br><br>Defendant and Appellant. | H038178<br>(Santa Clara County<br>Super. Ct. No. CC513427) |

Michelle Renee Bess appeals from the April 10, 2012 order committing her as a mentally disordered offender (MDO) pursuant to Penal Code section 2970 and 2972.[1] She asserts that the order of commitment must be reversed because she was not judicially advised of her right to a jury trial and she did not waive a jury. Since the record reflects that counsel waived a jury with appellant's assent, this court has no call in this case to decide the scope of a counsel's authority to waive a jury in other situations and we do not reach those issues.

We find no reversible error and affirm.

[1] All further statutory references are to the Penal Code.

I

*Facts and Procedural History*

On November 4, 2011, the People filed a petition for an order extending appellant's involuntary treatment at Patton State Hospital for one year. The petition alleged that, on December 19, 2005, she committed a violation of section 245, subdivision (a)(1), and was subsequently convicted and sentenced to a determinate prison term. It alleged that appellant was admitted to Patton State Hospital as a condition of parole pursuant to Penal Code section 2962 on November 23, 2009 and her commitment for involuntary treatment was extended by the court. It indicated that her present commitment would terminate in early May 2012. The petition stated that appellant "continues to suffer from a severe mental disorder, said mental disorder is not in remission or cannot be kept in remission without continued treatment, and that by reason of her mental disorder, [she] represents a substantial danger of physical harm to others."

The March 9, 2012 minute order reflects that appellant was not present and her counsel waived her presence. The court stated that its understanding that appellant had consulted with counsel and she was going to waive her right to jury trial and request a court trial. Counsel stated: "That's correct, your Honor. I've talked to her about the jury trial issue, and we would like [a] court trial."

A court trial on the petition was conducted on April 10, 2012.

The People called Gregory Leong to testify. He stated that he was a board certified psychiatrist currently employed at Patton State Hospital as a forensic psychiatrist. The court recognized Dr. Leong as an expert in the diagnosis and treatment of mental disorders and risk assessment.

Dr. Leong testified that he had interviewed appellant twice within the prior year, specifically on September 6, 2011 and March 22, 2012. He had drafted the report, dated October 14, 2011, requesting the filing of a petition to renew appellant's MDO commitment. Appellant's underlying conviction was an assault with a deadly weapon.

Following her arrest, appellant was found to have a blood alcohol level of 0.11 and cocaine was detected in her system.

Dr. Leong had reviewed her medical record from Patton State Hospital, which was current through March 27, 2012 (when she was transported) and Dr. Leong had spoken to appellant's current treatment team on March 22, 2012, appellant's treating psychiatrist on April 6, 2012, and a staff nurse on appellant's unit on April 9, 2012.

According to Dr. Leong, appellant's primary psychiatric disorder is schizoaffective disorder, bipolar type. An individual with schizoaffective disorder has prominent psychotic symptoms such as hearing voices and prominent mood symptoms, such as a significantly depressed mood, manic mood, lability of mood, irritability, or agitation. The bipolar type of schizoaffective disorder involves "elevated or manic-type mood" or "mood swings or lability of mood" as well as depression. Appellant's episodes of mania involve aggressiveness and irritability.

Dr. Leong had also given appellant a secondary diagnosis of polysubstance abuse. He believed there is "the likelihood that she also has some antisocial traits." Those antisocial traits fell short of a personality disorder. He described an antisocial personality style as "one in which the person disregards the rights of others."

Appellant had a history of auditory hallucinations, which began in adolescence. A voice had told her "to do things preemptively to others who might want to hurt her." It regularly said, " 'Get them before they get you.' " In the September 2011 interview with Dr. Leong, appellant indicated that she heard the voice of her grandfather. Appellant's grandfather had been abusive toward her when she was a child and he had assaulted her. Appellant had not heard voices for more than a year prior to the September 2011 interview.

When Dr. Leong interviewed appellant in September 2011, appellant was experiencing depression. When he interviewed her in March 2012, she had suffered recent periods of irritability as well as depression. During the prior year, appellant had

acted aggressively or had been assaultive toward peers or staff, which was an expression of the bipolar aspect of her schizoaffective disorder. Appellant's schizoaffective disorder was not currently in remission.

During an August 2011 incident, when another patient sat in a seat that appellant was reserving at a table, appellant swept all the patient's possessions off the table onto the floor. During a September 2011 incident, appellant threatened another patient using the phone when the patient did not hang up as she requested. Appellant said, " 'I'm going to beat your ass if you don't get off the phone.' " After the patient had hung up and left, appellant then used profane language toward a staff member who had witnessed the incident. Appellant said, "using the F word," something along the lines, "I don't give an F about it."

On January 12, 2012, appellant was sitting outside on a bench. When a male patient reached into a bag that appellant was minding for her boyfriend, appellant hit him. Appellant said that she struck him with an open hand.

Appellant's psychotropic medication was increased three times around this period, once during December 2011 and twice after the January 12, 2012 incident.

On January 23, 2012, appellant had a dispute over the use of the telephone with another patient. Appellant said something to the effect that "snitches are dead" and staff intervened by separating them. On January 24, 2012, appellant was found with white residue under her nose.

On March 22, 2012, appellant told Dr. Leong that, on January 24, 2012, she had snorted Wellbutrin, which was then one of her prescribed antidepressants. She explained that another patient had told her that a person can get high by snorting Wellbutrin; she admitted snorting Wellbutrin on three occasions. She told Dr. Leong that she would be able to abstain from snorting Wellbutrin or any other recreational substance. But, on March 26, 2012, appellant was found to have Wellbutrin, which was no longer prescribed

for her, in her possession. Based upon appellant's possession of Wellbutrin on March 26, 2012, Dr. Leong "highly doubt[ed] that her substance abuse disorder is in remission."

The snorting of Wellbutrin can cause agitation or psychosis and exacerbate appellant's schizoaffective disorder. When snorting Wellbutrin, appellant is out of compliance with her medication regime.

On March 26, 2012, appellant was found to be in possession of a number of other contraband items, including several hand-rolled cigarettes, loose tobacco, unauthorized money, and a liquid that looked like pruno, in addition to the Wellbutrin tablets. She subsequently admitted to her treating psychiatrist that the liquid was pruno, an alcoholic substance.

Dr. Leong opined that appellant is not in remission based on the adjustments to her medication since December 2011 to address her irritability, her sleep complaints, her reports of depression, and her mood symptoms during the four months before trial. The psychiatrist indicated that, even if appellant is not having overt hallucinations or overt paranoid thoughts, her extreme agitation or irritability during the past few months may be a manifestation of the psychotic component of the schizoaffective disorder.

It was Dr. Leong's opinion that appellant poses a substantial risk of harm to others if released into the community without supervision. While her primary mental health diagnosis is schiozoaffective disorder, he indicated that her mood disturbances and her antisocial features are synergistic. Those antisocial traits complicate the treatment and outcomes for appellant's schizoaffective disorder. Her polysubstance abuse also complicates and aggravates her schizoaffective disorder. Appellant's particular constellation of disorders heightens the risk to others in the community.

On cross-examination, Dr. Leong confirmed that a person could be irritable or agitated or experience depression without having schizoaffective disorder. He acknowledged that the fact appellant heard the voice of her grandfather who assaulted her could be a response to that trauma as opposed to a symptom of schizoaffective disorder if

it were assumed that was the only voice she had heard. He admitted that the situation of being locked up in a state hospital could cause someone to become depressed.

Dr. Leong also acknowledged that one of the hallmarks of antisocial traits is not following the rules. He acknowledged the possibility that someone with antisocial traits who is prevented from getting what they want could become irritable and lash out by hurting another's property or hitting someone. In Dr. Leong's opinion, however, appellant's schiozoaffective disorder was "active in that incident" of August 2011, when she swept another patient's belongings off a table, because appellant also had a depressed mood at that time even if her antisocial traits also played a part.

Dr. Leong granted that the September 2011 incident related to using the telephone was evidence of antisocial behavior but he believed it also could be evidence of a schizoaffective disorder if her behavior was "driven by irritability and impatience from the irritability." Dr. Leong observed that appellant was also experiencing depression during that period of time.

As to the January 2012 incident where appellant hit a male patient who reached into her bag, Dr. Leong acknowledged that the patient had no right to go into her bag and the hitting could be evidence of self-defense. He largely agreed that such an incident was not really evidence of antisocial traits or schizoaffective disorder but, in the hospital setting where appellant could have called the staff for assistance, appellant's conduct could have been an impulsive action driven by irritability. Appellant had explained to Dr. Leong that she hit the patient because she "wanted to."

With respect to the January 23, 2012 incident involving the telephone, Dr. Leong agreed that appellant's remark about snitches could be a symptom of her antisocial behavior. He stated, however, that her treating doctor had increased her medication Thorazine in December 2011 for the express purpose of treating appellant's irritability.

As to the forgoing incidents, Dr. Leong indicated that it was not possible to absolutely attribute each incident to either antisocial traits or schizoaffective disorder.

But Dr. Leong repeatedly noted that appellant was being treated for irritability, a symptom of schizoaffective disorder.

Dr. Leong conceded that the January 24, 2012 incident involving snorting Wellbutrin was evidence of the polysubstance abuse disorder and not directly evidence of the schizoaffective disorder.

As far as Dr. Leong knew, appellant was not hearing voices at the time of trial.

On redirect examination, Dr. Leong confirmed that the records reviewed for his October 2011 report disclosed that appellant had suffered from a psychotic disorder from the age of 13 years. Appellant had received psychiatric diagnoses for various psychotic disorders, including schizophrenia, since she was 16 years old. Dr. Leong's diagnosis for appellant was schizoaffective disorder. He stated that the affective or bipolar aspect of the disorder can occur along with antisocial features. Generally speaking, a diagnosis of schizoaffective disorder or schizophrenia continues for a lifetime. During the past year she had suffered from a good deal of depression and depression had been an ongoing issue for many years. It was appellant's self report that she was not hearing voices.

On recross examination, Dr. Leong confirmed that the treatment providers at Patton State Hospital had not observed behaviors consistent with auditory hallucinations during the previous year. The staff had not documented that appellant had displayed thought disorganization or noted that she had expressed unusual, bizarre or delusional thought content during the past year.

While the question whether appellant continued to suffer from schizoaffective disorder was an area of clinical concern and it was possible she had a secondary depression, appellant had reported depressive symptoms to her treating physician as recent as a week before the trial and she had "a longstanding recurrent depression . . . derived from a psychotic mood disturbance." It was Dr. Leong's clinical judgment that appellant's depression was associated with schizoaffective disorder.

No evidence was presented on behalf of appellant.

The trial court found the People had proved the petition true beyond a reasonable doubt and sustained the petition. The court ordered appellant committed for one year (§§ 2970, 2972).[2]

II

*Discussion*

A *Applicable Law*

" 'The Mentally Disordered Offender Act (MDO Act), enacted in 1985, requires that offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment . . . until their mental disorder can be kept in remission. (Pen. Code, § 2960 et seq.)' (*In re Qawi* (2004) 32 Cal.4th 1, 9 . . . .)" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061.) "The MDO Act provides for treatment of certified MDOs at three stages of commitment: as a condition of parole, in conjunction with the extension of parole, and following release from parole." (*Ibid*.)

"Sections 2970 and 2972 govern the third and final commitment phase, once parole is terminated. If continued treatment is sought, the district attorney must file a petition in the superior court alleging that the individual suffers from a severe mental disorder that is not in remission, and that he or she poses a substantial risk of harm. (§ 2970.) Commitment as an MDO is not indefinite; instead, '[a]n MDO is committed for one-year period[s] and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year.' (*People v. McKee* (2010) 47 Cal.4th 1172, 1202 . . . .)" (*Id*. at p. 1063; see § 2972, subds. (a) & (c).)

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[2] Appellant's commitment under the April 10, 2012 order expired during the pendency of this appeal. " 'We exercise our discretion to decide this otherwise moot case because it raises important issues that are capable of repetition but likely to evade review.' [Citations.]" (*Conservatorship of John L.* (2010) 48 Cal.4th 131, 142, fn. 2.)

If "the court or jury finds" beyond a reasonable doubt "that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others, the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed . . . ." (§ 2972, subd. (c), see 2972, subd. (a).)

B. *Statutory Rights to Advisement and Waiver*

Appellant argues that she was statutorily entitled to a jury trial under section 2972 unless she personally and expressly waived that right. She maintains that she received no judicial advisement and she did not waive a jury in the manner required by statute and, therefore, reversal is required.

Section 2972, subdivision (a), states in part: "The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney *and* of the right to a jury trial." (Italics added.) "The trial shall be by jury unless waived by both the person and the district attorney." (§ 2972, subd. (a).) In this case, the trial court did not advise appellant of her statutory right to a jury trial before trial, presumably because appellant was not present in court at any of the pretrial appearances and her counsel appeared on her behalf.

The statutory requirement of a judicial advisement regarding the dual rights to counsel and jury trial does not demonstrate that, once the person *is* represented by counsel, an express, personal jury waiver must be secured from the person on the record. Further, we see no reason that a represented person's right to a judicial advisement regarding the right to a jury trial may not be forfeited by the person's waiver of every appearance throughout the proceeding until the time of trial. It may *not* be presumed that a person who has been evaluated or treated for a mental disorder is incompetent to waive his or her appearance. (*Conservatorship of John L., supra*, 48 Cal.4th at p. 154.) Under these circumstances, it is not clear to us that a represented person is entitled to a remedy

for the failure of the court to give this statutorily mandated advisement. (Cf. *People v. Villalobos* (2012) 54 Cal.4th 177, 182 [failure to object to restitution fine at or before sentencing forfeited claim of advisement error].)

As to the statutory provision for waiver of a jury trial by "the person," we conclude that requirement does not necessarily establish that any waiver of a jury must be personally communicated by the person on the record before trial rather than waived by counsel on the person's behalf. The California Supreme Court has determined that "[w]hen a statutory right in a civil commitment scheme is at issue, the proposed conservatee may waive the right through counsel if no statutory prohibition exists. [Citations.]" (*Conservatorship of John L., supra*, 48 Cal.4th at p. 148.) We see no reason the same principle would not apply to MDO proceedings. Even in the criminal context where an express, personal waiver of the constitutional right to jury trial must be secured from a criminal defendant (Cal. Const., art. I, § 16), "[t]he requirement of an express waiver applies to the constitutional right to a jury trial, but not to jury trial rights that are established only by statute. [Citations.]" (*People v. French* (2008) 43 Cal.4th 36, 46.)

The Legislature knows how to require an express or personal waiver. The California Constitution article I, section 16 provides: "A jury may be waived in a criminal cause by the consent of both parties expressed *in open court by the defendant* and the defendant's counsel." (Italics added.) Welfare and Institutions Code section 1801.5 states with respect to a petition for extended detention of youthful offenders: "[T]he trial shall be by jury unless the right to a jury trial is *personally waived by the person*, after he or she has been fully advised of the constitutional rights being waived, and by the prosecuting attorney, in which case trial shall be by the court." (Italics added.)

The language of section 2972 does not impose any requirement that the court obtain an express, personal waiver from the person who is the subject of a petition for continued treatment. Other courts looking at the same or a similar provision have not reached an inconsistent conclusion. (See *People v. Montoya* (2001) 86 Cal.App.4th 825,

830 [§ 2972] [4th Dist.]; *People v. Otis* (1999) 70 Cal.App.4th 1174, 1176 [§ 2966, subd. (b)] [2d Dist.]; cf. *People v. Givan* (2007) 156 Cal.App.4th 405, 409-411 [§ 1026.5, subd.(b)] [5th Dist.]; *People v. Powell* (2004) 114 Cal.App.4th 1153, 1159 [§ 1026.5, subd.(b)] [2d Dist.].) We decline to insert any such requirement. (See Code Civ. Proc., § 1858.)

Finally, even assuming that the court erred by not advising appellant of her statutory right to a jury trial and by not holding a jury trial because defendant did not personally waive her statutory right to a jury on the record, reversible error had not been established. Article VI, section 13, of the California Constitution states: "No judgment shall be set aside . . . in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) "Mere possibilities" of a more favorable result do not suffice because "otherwise the entire purpose of the constitutional provision would be defeated." (*Id*. at p. 837.)

As indicated, the record discloses that appellant's counsel informed the court that appellant was waiving a jury and requesting a court trial. An attorney is obligated to keep his client fully informed of proceedings, to advise client of his rights, and to refrain from any act or representation that misleads the court (See *Conservatorship of John L.*,

*supra*, 48 Cal.4th at pp. 151-152.) Absent any contrary indication, the superior court may assume that an attorney is competent and fully communicates with a proposed committee about the entire proceeding. (*Id*. at pp. 156-157.) On appeal in this case, we must presume that counsel's representation to the superior court was accurate. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.) Thus, on the record before us, we have no reason to believe that appellant would have requested a jury trial if she had received a judicial advisement of her statutory right to be tried by a jury or that she would have demanded a court trial if the court had sought her personal waiver of a jury on the record.

Further, it is not reasonably probable that a result more favorable to appellant would have been reached even if the trier of fact had been a jury instead of the court. Dr. Leong, the People's expert, determined that appellant's primary mental health diagnosis was schiozoaffective disorder and she was not in remission even though her medication had been increased. He testified to her mental health history and recent incidents in Patton State Hospital. In his opinion, appellant posed a substantial risk of harm to others if released into the community without supervision. Dr. Leong's testimony was uncontroverted. No evidence was presented on behalf of appellant. Any suggestion that a jury might have reached a different result would be sheer speculation.

Thus, even if the statute required the court to advise appellant of her statutory right to a jury trial and to secure her personal, express waiver, any statutory error in failing to do so must be deemed harmless. (Cal. Const., art. I, § 16; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

C. *Federal Due Process*

Appellant asserts that she was entitled to a jury trial under the due process clause of the Fourteenth Amendment to the United States Constitution.[3] The Fourteenth

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[3] Appellant also claims that she was deprived of her right to a jury trial under principles of equal protection. "Because of the fundamental interests at stake, equal protection principles are often invoked in civil commitment cases to ensure that the

Amendment of the United States Constitution provides that no state may "deprive any person of life, liberty, or property, without due process of law."

We have no doubt that appellant was entitled to procedural due process. (See *Jones v. U.S.* (1983) 463 U.S. 354, 361 [103 S.Ct. 3043] ["It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.' [Citation.]".) "[F]or the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty' [citation], and in consequence 'requires due process protection.' [Citations.] The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that '[w]hether we label this phenomena "stigma" or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.' [Citation]. " (*Vitek v. Jones* (1980) 445 U.S. 480, 491-492 [100 S.Ct. 1254].)

"Once it is determined that due process applies, the question remains what process is due." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593].) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (*Ibid.*) "[I]dentification of the specific dictates of due process generally requires

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statutory scheme applicable to a particular class of persons has not treated them unfairly in comparison with other groups with similar characteristics. (*People v. McKee* (2010) 47 Cal.4th 1172, 1199 . . . and cases cited.)" (*People v. Barrett* (2012) 54 Cal.4th 1081, 1107.) The equal protection guarantee is "essentially a direction that all persons similarly situated should be treated alike. [Citation.]" (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249].) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 530, italics omitted, fn. omitted.) With respect to the right to a jury trial, appellant has not met this threshold requirement since MDO's, like other proposed committees under similar commitment schemes, are afforded a jury trial by statute.

consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [96 S.Ct. 893].) "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citations.]" (*Id*. at p. 333.)

Citing *Mathews*, the U.S. Supreme Court stated in *Addington v. Texas* (1979) 441 U.S. 418, 425 [99 S.Ct. 1804]: "In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. [Citations.]" The court concluded that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." (*Id*. at p. 427.) But the court also concluded that the "beyond a reasonable doubt" standard of proof was "inappropriate in civil commitment proceedings." (*Id*. at p. 432.) It held that due process was satisfied by a standard of proof "equal to or greater than the 'clear and convincing' standard." (*Id*. at p. 433.)

At one time, the California Supreme Court believed that involuntary commitment proceedings could be equated to criminal proceedings for purposes of determining applicable constitutional protections. (See e.g. *People v. Feagley* (1975) 14 Cal.3d 338, 342, 351 [Mentally Disordered Sex Offender (MDSO)]; *People v. Burnick* (1975) 14 Cal.3d 306, 324, 332 [MDSO]; *In re Gary W.* (1971) 5 Cal.3d 296, 307 [continued detention by CYA].) In *Addington v. Texas, supra*, 441 U.S. 418, the U.S. Supreme

Court distinguished *In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068], upon which the California Supreme Court had relied in *Burnick*: "There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense. Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution. [Citation.] [¶] In addition, the 'beyond a reasonable doubt' standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the 'moral force of the criminal law,' *In re Winship*, 397 U.S., at 364 . . . , and we should hesitate to apply it too broadly or casually in noncriminal cases. [Citation.]" (*Id*. at p. 428, fn. omitted.)

The United States Supreme Court has not recognized a federal constitutional right to a jury trial in noncriminal proceedings for involuntary commitment or treatment. It has not drawn a constitutional equivalency between involuntary commitment proceedings and criminal prosecutions. Rather, the court has indicated that federal constitutional protections guaranteed in criminal proceedings do not necessarily apply to involuntary commitment proceedings.

In *Allen v. Illinois* (1986) 478 U.S. 364 [106 S.Ct. 2988], the U.S. Supreme Court determined with respect to civil commitment proceedings under the Illinois Sexually Dangerous Persons Act that the state's decision to provide some procedural safeguards applicable in criminal trials did not turn the "proceedings into criminal prosecutions requiring the full panoply of rights applicable there." (*Id*. at p. 372.) The court stated: "*Addington* demonstrates that involuntary commitment does not itself trigger the entire range of criminal procedural protections." (*Ibid*.) It held that the proceedings were not "criminal" within the meaning of the Fifth Amendment's privilege against self-incrimination and the due process clause did not independently require its application in those noncriminal proceedings. (*Id*. at pp. 374-375.)

In the earlier case of *McKeiver v. Pennsylvania* (1971) 403 U.S. 528 [91 S.Ct. 1976] (plur. opn. of Blackmun, J.), the U.S. Supreme Court faced the issue "whether the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding." (*Id*. at p. 530.) Although the plurality opinion recognized that due process requires fundamental fairness in juvenile proceedings (*id*. at p. 543), it concluded that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement." (*Id*. at p. 545.)

The plurality opinion reasoned in part: "[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have they been generally used in military trials." (*Id*. at p. 543.) It determined that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function." (*Id*. at p. 547.) Justice White in his concurring opinion stated: "Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge. Nevertheless, the consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice. We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence automatically subject to all of the restrictions normally applicable in criminal cases. The question here is one of due process of law and I join the plurality opinion concluding that the States are not required by that clause to afford jury trials in juvenile courts where juveniles are charged with improper acts." (*Id*. at p. 551 (conc. opn. of White, J.).)

Even if we assume appellant had a due process right under the federal Constitution to be tried by a jury in MDO proceedings for continued treatment (but cf. *U.S. v. Sahhar* (1990) 917 F.2d 1197, 1206-1207, cert. den. (1991) 499 U.S. 963 [111 S.Ct. 1591] [Fifth Amendment's due process clause does not guarantee the right to a jury trial in federal civil commitment proceedings]), the statute satisfied due process by guaranteeing a right to jury trial. (§ 2972, subd. (a).) Again, on the record before us we must presume that appellant was aware that she was entitled to a jury trial and her counsel waived a jury in accordance with her informed wishes. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; see also *Conservatorship of John L.*, *supra*, 48 Cal.4th at pp. 151-152, 156-157.)

To the extent appellant is arguing that she had concomitant due process rights, under the Fourteenth Amendment of the federal Constitution, to a judicial advisement of her right to be tried by a jury and to personally and expressly waive a jury on the record, we are not persuaded. For one thing, the existence of a constitutional right does not always entail the right to a judicial advisement and express, personal waiver of that right. (Cf. *People v. Bradford* (1997) 14 Cal.4th 1005, 1052-1053, cert. denied (1997) 522 U.S. 953 [118 S.Ct. 377] [criminal defendant has no right to express, personal waiver of constitutional right to testify; a trial judge may safely assume that a nontestifying defendant is abiding by his counsel's trial strategy].)

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." (*Carey v. Piphus* (1978) 435 U.S. 247, 259 [98 S.Ct. 1042].) "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 344.) Where a person is represented by counsel in MDO proceedings for continued treatment (§§ 2970, 2972), the additional requirements of a judicial advisement and an express, personal waiver of a jury trial right are not needed to ensure fundamental

fairness. (See *Lassiter v. Department of Social Services of Durham County, N.C.* (1981) 452 U.S. 18, 33 [101 S.Ct. 2153] [Fourteenth Amendment to the U.S. Constitution "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair"].) The provision of counsel serves to safeguard the person's rights and interests.

Also, where the proposed committee is represented by counsel, we cannot imagine that federal due process affords greater rights concerning advisement and waiver of a jury trial in civil commitment proceedings than does the Seventh Amendment to the U.S. Constitution, which explicitly preserves the right to a jury trial in suits at common law.[4] A party waives this constitutional right by failing to make a proper demand (See *U.S. v. Moore* (1951) 340 U.S. 616, 621 [71 S.Ct. 524]; *Duignan v. U.S.* (1927) 274 U.S. 195, 198 [47 S.Ct. 566]; Fed. Rules of Civ. Proc., rule 38(a) & (d)) and, even if a proper demand is made, "knowing participation in a bench trial without objection constitutes waiver of a timely jury demand" (*White v. McGinnis* (9th Cir. 1990) 903 F.2d 699, 700 (en banc) (1990) cert. den. 498 U.S. 903 [111 S.Ct. 266].)

Appellant has not established that that she was deprived of due process under the U.S. Constitution.

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[4] "[T]he phrase 'Suits at common law' . . . refer[s] to 'suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.' *Parsons v. Bedford*, 3 Pet. 433, 447, 7 L.Ed. 732 (1830). Although 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791,' the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. *Curtis v. Loether*, 415 U.S. 189, 193, 94 S.Ct. 1005, 1007, 39 L.Ed.2d 260 (1974)." (*Granfinanciera, S.A. v. Nordberg* (1989) 492 U.S. 33, 42 [109 S.Ct. 2782].) The Seventh Amendment "governs proceedings in federal court, but not in state court . . . ." (*Gasperini v. Center for Humanities, Inc.* (1996) 518 U.S. 415, 432 [116 S.Ct. 2211].)

**D. *State Constitution***

Appellant contends that the court deprived her of a state constitutional right to a jury trial.

A hearing on a petition for continued treatment as an MDO is explicitly defined as civil in nature (Pen. Code, § 2972, subd. (a)) and courts have uniformly determined that MDO proceedings are noncriminal and the persons against whom such petitions are brought do not necessarily have the same rights as criminal defendants. (See e.g. *People v. Williams* (2003) 110 Cal.App.4th 1577, 1580 [*Faretta* federal constitutional right to self-representation does not apply in MDO proceeding]; *People v. Montoya* (2001) 86 Cal.App.4th 825, 828-830 [proposed MDO committee has no Sixth Amendment right to jury trial]; *People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443-1446 [proposed MDO committee does not have absolute right not to testify].) Accordingly, although California's Constitution guarantees trial by jury in criminal actions and requires criminal defendants to personally and expressly waive that right (Cal. Const., art. I, § 16), this waiver provision does not apply to MDO proceedings for continued treatment.

Article I, section 16, of the California Constitution also provides in part: "In a civil cause a jury may be waived by the consent of the parties expressed *as prescribed by statute*." (Italics added.) But "the right guaranteed is that of a jury trial as it existed at common law, when the state Constitution was first adopted. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75-76 . . . .) Consequently, the constitutional right to a jury trial does not apply to actions in equity [citation] or to special proceedings [citation], although the Legislature may provide for a jury trial in these situations by statute [citation]." (*Corder v. Corder* (2007) 41 Cal.4th 644, 656, fn. 7; see Code Civ. Proc., §§ 22-24, 30; see also *Tide Water Associated Oil Co. v. Superior Court of Los Angeles County* (1955) 43 Cal.2d 815, 822.) A proceeding on a petition for continued treatment of an MDO is a statutorily created special proceeding of a civil nature (cf. *Moore v. Superior Court* (2010) 50 Cal.4th 802, 815 [SVP]; *In re Gary W.* (1971) 5

Cal.3d 296, 309 [continued detention by CYA]; *People v. Succop* (1967) 67 Cal.2d 785, 789 [MDSO]) and it is not a "civil cause" within the meaning of article I, section 16 of the California Constitution. (See *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 75-76; but see *People v. Montoya*, *supra*, 86 Cal.App.4th 825, 830.)

Article I, section 7, of the California Constitution provides in pertinent part: "A person may not be deprived of life, liberty, or property without due process of law . . . ." We assume for purposes of this appeal that a person against whom a petition for continued treatment as an MDO has been filed is entitled to a jury trial under this provision as a matter of California due process. (See e.g. *People v. Feagley*, *supra*, 14 Cal.3d at pp. 342, 349-352 [MDSO]; *In re Gary W.* (1971) 5 Cal.3d 296, 307 [continued detention by CYA.)[5] The MDO statute satisfied any such due process requirement by providing a right to jury trial. (§ 2972, subd. (a).)

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[5] Due process jurisprudence has evolved substantially since those decisions and it is not clear that California's present-day Supreme Court would reach the same conclusions. (See *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 ["More recently this court has recognized, however, that the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and that not all of the safeguards required in the former are appropriate to the latter"]; *People v. Tilbury* (1991) 54 Cal.3d 56, 59 [a person who has been found not guilty by reason of insanity and committed to a state hospital is not entitled to a jury trial on eligibility for placement in a community mental health program as a supervised outpatient]; *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1405 ["in recent years, courts have reevaluated the nature of civil commitment proceedings and the application of criminal procedural safeguards in those proceedings. This reevaluation has led to the conclusion that defendants in civil commitment proceedings, generally, are not constitutionally entitled to the procedural safeguards afforded to defendants in criminal trials"].) In *Tilbury*, the California Supreme Court gave several reasons for its decision, including the following. "First, the involvement of a liberty interest does not by itself implicate the right to a jury. Juries have not been found necessary in other proceedings that can result in deprivations of liberty. (E.g., *Morrissey v. Brewer, supra,* 408 U.S. 471, 488–489, 92 S.Ct. 2593, 2603–2604 [stating the minimum requirements of due process in parole revocation hearings]; *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 541–551, 91 S.Ct. 1976, 1984–1989, 29 L.Ed.2d 647 [the due process clause of the Fourteenth Amendment, incorporating the Sixth Amendment, does not require juries in juvenile court proceedings]; *Baldwin v. New*

Appellant has not demonstrated that, under California's Constitution, she had concomitant due process rights to receive a judicial advisement regarding her right to be tried by jury and to personally waive the right on the record. We find our analysis of what is required by due process under the federal Constitution to be equally applicable with respect to our state Constitution.

Further, although an MDO proceeding may not be a "civil cause" within the meaning of article I, section 16, of the California Constitution, we find the permissive means of waiving the constitutional right to a jury trial in civil causes to be instructive. That right may be waived as provided by Code of Civil Procedure section 631, subdivision (f). (Cal. Const., art. I, § 16; Code Civ. Proc., § 631, subd. (a).)

Nothing in section 631 of the Code of Civil Procedure requires a formal judicial advisement of the right to jury trial. A personal or an express waiver of that right is not statutorily mandated. (See Code Civ. Proc., § 631, subd. (f).)[6] For example, the right to jury trial is waived by the failure to make a timely demand for a jury. (Code Civ. Proc., § 631, subd. (f)(4).) Further, the acts described by section 631 will normally be

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*York* (1970) 399 U.S. 66, 68– 74, 90 S.Ct. 1886, 1887–1891, 26 L.Ed.2d 437 [the same is true in trials of petty offenses].)" (*People v. Tilbury*, *supra*, 54 Cal.3d at p. 69.) "Second, there is no reason to believe that a jury's decision on outpatient placement would be more reliable than a judge's. . . . Juries have no more expertise in predicting future dangerousness than judges. Moreover, in the event of an erroneous decision the committed person has recourse to the writ of habeas corpus and to direct appeal (see Code Civ. Proc., § 904.1, subd. (b)), which are the same mechanisms that ensure the reliability of jury verdicts." (*Ibid*.)

[6] Code of Civil Procedure section 631, subdivision (f), provides: "A party waives trial by jury in any of the following ways: [¶] (1) By failing to appear at the trial. [¶] (2) By written consent filed with the clerk or judge. [¶] (3) By oral consent, in open court, entered in the minutes. [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee. [¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (e)."

performed by counsel. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 411 (conc. opn. of Bird, C.J.).) Certainly where a proposed committee is represented by counsel, we remain unconvinced that the California Constitution's guarantee of due process confers greater rights with respect to advisement and waiver in a civil commitment proceeding than does the explicit constitutional right to a jury trial in a civil cause, as implemented by Code of Civil Procedure section 631.

*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, which appellant repeatedly cites, does not aid her. In that case, the Supreme Court held that the parties' "predispute agreement that any lawsuit between them and real party would be adjudicated in a court trial, and not by jury trial, was unenforceable." (*Id.* at p. 950.) This was not one of the means of waiving trial by jury under Code of Civil Procedure section 631, former subdivision (d) (now (f)), and waiver of the constitutional right to jury trial in a civil cause is permitted only as prescribed by statute. (*Grafton Partners L.P. v. Superior Court*, *supra*, 36 Cal.4th at pp. 956-961.)

As we have already stated, on the record before us, we must presume that appellant's counsel informed her that she had a right to be tried by a jury and her counsel waived a jury trial in accordance with her informed wishes. Appellant has not established that that she was deprived of due process under California's Constitution.

DISPOSITION

The April 10, 2012 order of commitment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.